(2)

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

No. 94-414

In the Supreme Court of the United States

OCTOBER TERM, 1994

SUSANA M. PACIFICO, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
MARK C. NILES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the petition for review of the decision of the Merit Systems Protection Board was timely filed in the Federal Circuit.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Borden Co. v. *United States*, 134 F. Supp. 387 (D.N.J. 1955)	5-6
Charlson Realty Co. v. *United States*, 384 F.2d 434 (Ct. Cl. 1967)	5
City of Chicago v. *United States Dep't of Labor*, 737 F.2d 1466 (7th Cir. 1984)	6
Danko v. *Director, OWCP*, 846 F.2d 366 (6th Cir. 1988)	5
FDIC v. *Schaffer*, 731 F.2d 1134 (4th Cir. 1984)	6
Guirguis v. *INS*, 993 F.2d 508 (5th Cir. 1993)	5
Hobbs, In re, 141 B.R. 466 (Bankr. N.D. Ga. 1992)	6
Kahler-Ellis Co. v. *Ohio Turnpike Comm'n*, 225 F.2d 922 (6th Cir. 1955)	6
Miller v. *United States Postal Serv.*, 685 F.2d 148 (5th Cir. 1982), cert. denied, 461 U.S. 916 (1983)	5
Pinat v. *OPM*, 931 F.2d 1544 (Fed. Cir. 1991)	5
Phillips v. *Riverside, Inc.*, 796 F. Supp. 403 (E.D. Ark. 1992)	6
Schepps Food Stores, Inc., In re, 152 B.R. 136 (Bankr. S.D. Tex. 1993)	6
Vogelsang v. *Patterson Dental Co.*, 904 F.2d 427 (8th Cir. 1990)	6
White v. *INS*, 6 F.3d 1312 (8th Cir. 1993), cert. denied, 114 S. Ct. 2162 (1994)	6

Statutes and rule: Page

5 U.S.C. 7703(b)(1) 4
Fed. R. App. P.:
Rule 20 5
Rule 25(a) 4, 5, 6
Fed. Cir. R.:
Rule 15(c) 3
Rule 52(a)(1) 3
Sup. Ct. R. 29.2 4

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-414

SUSANA M. PACIFICO, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals (Pet. App. 13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1994. A petition for reconsideration was denied on April 21, 1994. Pet. App. 14. Petitioner's motion for further reconsideration was denied on May 5, 1994. Pet. App. 15. The petition for a writ of certiorari was filed on July 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1991, the Office of Personnel Management (OPM) issued a decision holding that petitioner had received an overpayment of $22,575.37 in civil service annuity benefits. On June 22, 1992, after further evaluation of the case, OPM denied petitioner's request for a full waiver of overpayment liability, but issued a new decision reducing the amount of calculated overpayment to $13,493.52. OPM informed petitioner that she had a right to appeal that decision to the Merit Systems Protection Board (MSPB) and that she had 25 days from the date of the decision to do so.

On July 21, 1992, petitioner attempted to appeal OPM's decision to the MSPB. On July 23, an Administrative Judge (AJ) notified petitioner that her appeal appeared to be untimely and gave her an opportunity to show that it was timely filed or, alternatively, to show good cause for the delay. After a hearing, the AJ issued an initial decision on November 18, 1992, dismissing petitioner's appeal as untimely. Petitioner filed a petition for review of that decision with the full Board, which the MSPB denied on March 19, 1993. In its March 19 decision, the MSPB informed petitioner that she had a right to appeal the Board's final decision to the Federal Circuit "no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first."[1] Peti-

---

[1] The Certificate of Service attached to the Order indicated that a copy of the Order was sent on March 19 by certified mail to Stephen Bolinger, petitioner's attorney, and by regular mail to petitioner. MSPB Order (Mar. 19, 1993).

tioner's counsel received notice of the decision by certified mail on or before March 22, 1993.[2]

Petitioner sought review of the MSPB's dismissal, allegedly mailing her petition for review to the Federal Circuit on April 15, 1993. Pet. 3. However, the petition for review was apparently not received by the clerk of the Federal Circuit until May 10, 1993. Pet. 7.[3] On March 18, 1994, twenty days before oral argument was scheduled, the court of appeals dismissed the petition for review as untimely. Pet. App. 13. Petitioner moved for reconsideration, asserting the presumption that letters properly addressed will be delivered in a timely manner. Petitioner's petition for reconsideration and a petition for further reconsideration were denied. Pet. 4.

ARGUMENT

Petitioner contends that the court of appeals erred in not applying the "Mail Box Rule" to the calculation of the filing deadline for her petition for review. Pet. 5. She argues that the court of appeals should have deemed

---

[2] A return receipt request was sent to petitioner's counsel along with the final decision of the MSPB on March 19, 1993. The receipt was returned by mail on March 22, 1993.

[3] Petitioner's petition for review was stamped "Received" on May 10, 1993, and was also stamped "Filed" on that date. Petitioner's May 10, 1993, appeal was initially dismissed for technical deficiencies concerning the docketing fee required by Federal Circuit Rule 52(a)(1) and the lack of the requisite Rule 15(c) Statement Concerning Discrimination. Order by the Federal Circuit, June 9 dated 1993; Order by the Federal Circuit dated October 26, 1993. These deficiencies were cured, and the petition was reinstated on November 12, 1993.

The case was docketed, briefs were submitted, and oral argument was scheduled to take place on April 7, 1994. Order by the Federal Circuit dated February 28, 1994.

her petition for review to have been filed on April 15, 1993, the day it was mailed, pursuant to Supreme Court Rule 29.2.[4] Pet. 7. Neither the mail box rule nor Supreme Court Rule 29.2 applies to this case, however. Federal Rule of Appellate Procedure 25(a) (FRAP 25(a)) determines when documents mailed to the courts of appeals will be considered "filed." FRAP 25(a) provides that:

> Papers required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but *filing is not timely unless the clerk receives the papers within the time fixed for filing*, except that *briefs and appendices* are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used.

(emphasis added).

The question here concerns the filing of a petition for review, rather than of a brief or appendix. The time for filing a petition for review of a final decision by the MSPB is set out in 5 U.S.C. 7703(b)(1). It allows a petitioner 30 days from the time that he or she receives notice of a final decision to file a petition for review in the Federal Circuit.[5] In this case, petitioner received

---

[4] "To be timely filed, a document must actually be received by the Clerk within the time specified for filing; or be sent to the Clerk by first-class mail, postage prepaid, and bear a postmark showing that the document was mailed on or before the last day for filing." Sup. Ct. R. 29.2.

[5] Section 7703(b)(1) provides that: "a petition to review a final order or final decision of the [MSPB] shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed

notice of the final decision on or before March 22, 1993, but the petition for review was not received by the clerk until May 10, 1993. To be timely filed, her petition for review had to be received by the clerk of the court no later than April 22, 1993.

Contrary to petitioner's contention, the Federal Circuit did not apply "a different standard than the rest of the Federal Judicial system" (Pet. 7) when it deemed the petition to have been filed when it was received and not when it was mailed. The court of appeals applied the controlling rule, FRAP 25(a),[6] and its application is consistent with all the reported decisions of which we are aware. See, *e.g.*, *Pinat* v. *OPM*, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (filing of a petition for review of an MSPB decision is deemed to have occurred "when the required papers are received by the clerk of the court"); *Guirguis* v. *INS*, 993 F.2d 508, 510 (5th Cir. 1993); *Danko* v. *Director, OWCP*, 846 F.2d 366, 369 (6th Cir. 1988); *Miller* v. *United States Postal Serv.*, 685 F.2d 148, 149 (5th Cir. 1982) (pursuant to FRAP 25(a) "the petition [for review of a final decision of the MSPB] must be *received* by the clerk within the applicable period, not mailed or postmarked during this period."), cert. denied, 461 U.S. 916 (1983).

Petitioner also contends that documents properly addressed and posted should be presumed to arrive in the ordinary course of mail delivery. *Charlson Realty Co.* v. *United States*, 384 F.2d 434, 442 (Ct. Cl. 1967); *Borden*

---

within 30 days after the date the petitioner received notice of the final order or decision of the Board."

[6] Rule 25(a) of the Federal Rules of Appellate Procedure applies to the review of agency orders. Fed. R. App. P. 20; *Miller* v. *United States Postal Serv.*, 685 F.2d 148, 149 (5th Cir. 1982), cert. denied, 461 U.S. 916 (1983).

Co. v. *United States*, 134 F. Supp. 387, 391 (D.N.J. 1955). These cases do not address FRAP 25(a), however, or its specific language providing that filing occurs only upon the actual receipt of the documents. See *White* v. *INS*, 6 F.3d 1312, 1317-1318 (8th Cir. 1993) (although the petition for review was mailed five days before the filing deadline, the petition was barred as untimely under FRAP 25(a) because received one day after the deadline), cert. denied, 114 S. Ct. 2162 (1994). Any other interpretation would contradict the plain language of FRAP 25(a).

Petitioner cites several cases construing the common law presumption that a letter that is properly addressed, stamped and placed in the mail will be delivered to the addressee in a timely manner.[7] Cases construing such a rule, however, have no bearing on the application of FRAP 25(a). See *Vogelsang* v. *Patterson Dental Co.*, 904 F.2d 427, 429-430 (8th Cir. 1990) ("it is evident that the Federal Rules of Appellate Procedure do not equate simply placing a notice in the mail with the filing required by the rules"); *City of Chicago* v. *United States Dep't of Labor*, 737 F.2d 1466, 1471 (7th Cir. 1984) ("It is well settled that a notice of appeal or a petition for review is filed once the Court of Appeals receives actual custody of the document."); *Kahler-Ellis Co.* v. *Ohio Turnpike Comm'n*, 225 F.2d 922, 922 (6th Cir. 1955) ("Here, only the act of depositing the notice in the mails

---

[7] *FDIC* v. *Schaffer*, 731 F.2d 1134, 1137 (4th Cir. 1984); *In re Schepps Food Stores, Inc.*, 152 B.R. 136, 139 (Bankr. S.D. Tex. 1993); *Phillips* v. *Riverside, Inc.*, 796 F. Supp. 403, 407 (E.D. Ark. 1992), and *In re Hobbs*, 141 B.R. 466, 468 (Bankr. N.D. Ga. 1992), do not involve filings of documents with federal courts of appeals; do not involve FRAP 25(a); and do not support the conclusion that the explicit rule set out in FRAP 25(a) should be ignored or superseded by the common law rule relied upon by petitioner.

occurred within thirty days. This is not a filing; only when the clerk acquires custody has it been filed.").

Petitioner's petition for review of the MSPB's March 19, 1993 decision was untimely. The Federal Circuit correctly dismissed the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
MARK C. NILES
Attorneys

NOVEMBER 1994